

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EVIER DIAZ PAEZ,

Petitioner

v.

DWIGHT NEVEN, et al.,

Respondents

Case No.: 2:16-cv-02737-JAD-NJK

Merits Order
Denying Habeas Relief

[ECF No. 10]

Petitioner Evier Diaz Paez was sentenced to 15 years to life in prison with the possibility of parole after being found guilty in Nevada state court of attempt murder with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, and first-degree kidnapping with use of a deadly weapon.¹ In a thirteen-count petition, Paez seeks a writ of habeas corpus under 28 U.S.C. § 2254 based on claims that his trial and appellate counsel were ineffective and that the state district court erroneously excluded evidence.² Having evaluated the merits of those claims, I find that habeas relief is not warranted, so I deny Paez's petition, deny him a certificate of appealability, and close this case.

Background

A. The facts underlying Paez's conviction³

Paez's conviction arises from the alleged 2007 shooting of Tremayne Adamson by a man known to Adamson only as "Bounce." Adamson testified that on October 14, 2007, a woman he knew as Ginger Sanford invited him to a birthday party at her house. Sanford picked Adamson up and drove him to her house for the party. There, Adamson recognized an individual with the nickname "Bounce." Adamson had met Bounce on two prior occasions, including one at Bounce's apartment.

¹ ECF No. 27-9.

² ECF No. 10.

³ These facts are taken from the trial transcripts. ECF Nos. 27-1, 27-2. For simplicity's sake, I cite to these exhibits generally for this entire background section.

1 Adamson had asked Sanford to drive him home. Sanford told Adamson that because she
2 was too tired to drive, Bounce would give him a ride. Bounce drove the vehicle while Sanford
3 sat in the front passenger seat and Adamson sat in the rear passenger-side seat. Adamson did not
4 give directions to Bounce but assumed that Sanford had. Bounce drove to an industrial
5 development near Adamson's home and stopped the car. Bounce said that he had to urinate and
6 got out of the car. He returned to the passenger-side of the car holding a small black revolver.
7 He pointed the revolver at Adamson and asked "[do you] know where [my] stuff is?" Bounce
8 then shot Adamson three times, hitting Adamson twice in his torso and once in his arm. Bounce
9 repeated the question and then shot Adamson three more times hitting Adamson twice in his
10 head and once again in his arm. Sanford remained in the front passenger seat and did not react.

11 After shooting Adamson, Bounce returned to the driver's seat and began driving. While
12 driving, Bounce reached his arm into the backseat to push Adamson's head down. Adamson
13 unlocked the door and dove out of the car while the car was still moving. Bounce drove off and
14 did not turn the car around. Adamson began walking down the street towards his home while
15 attempting to flag down cars. One motorist slowed down to observe Adamson and called 911.
16 After walking about a quarter of a mile, Adamson was located along the road by emergency
17 responders, who provided medical assistance before transporting Adamson to a hospital. During
18 questioning from a paramedic at the scene, Adamson identified Bounce as the individual who
19 shot him. On the night that he was shot, Adamson had a glass pipe and lighter in his pocket. He
20 testified that although he was regularly smoking meth in 2007, he did not use drugs on the night
21 that he was shot.

22 On the same night as the shooting while at the hospital, Adamson spoke to a detective
23 identifying Sanford by her first name "Ginger," because Adamson did not know her last name.
24 Adamson also identified Sanford's father by his full name and identified the shooter by the name
25 of "Bounce." During an interview with detectives two days after the shooting, Adamson
26 described Bounce as "a Puerto Rican male in—approximately in his 30s, very tall, about 6'3",
27 with a large build, short hair." He also identified the apartment building where he had visited
28 Bounce on a prior occasion. Detectives retrieved identifying information for the individuals who

1 rented the apartments in the building. Detectives conducted a photographic line-up in which
2 Adamson identified Paez as the individual who shot him.

3 While he was in custody, Paez made several telephone calls that were recorded. Based
4 on such calls between Paez and an individual named Paula Babich, detectives obtained and
5 executed a search warrant on Paez's mother's home. Detectives retrieved handwritten notes
6 containing a telephone number for Sanford from his mother's home. Detectives did not locate
7 the weapon (a .22 caliber firearm) used to shoot Adamson. During his recorded telephone calls,
8 Paez referred to an individual by the name of "Maria," whom detectives determined was
9 Sanford. Paez also spoke to Sanford directly over the telephone, expressed that he loved her, and
10 spoke to her about covering the tattoo of his initials on her arm.

11 **B. Procedural history**

12 Paez was charged with attempt murder with use of a deadly weapon, battery with use of
13 a deadly weapon resulting in substantial bodily harm, and first-degree kidnapping with use of a
14 deadly weapon.⁴ The state district court assigned counsel from the public defender's office to
15 represent Paez.⁵ Trial was scheduled for May 3, 2010. Shortly before trial was set to begin,
16 counsel discovered that the public defender's office previously represented Adamson, and
17 counsel filed a motion to withdraw on April 28, 2010.⁶ The public defender's office represented
18 Adamson in a matter that closed in 2005 and in which Adamson was adjudicated guilty of
19 conspiracy to commit theft, which is a gross misdemeanor and a crime of dishonesty.⁷ Counsel
20 argued that he "would be expected and required to attack the credibility of [Adamson], a former
21 client."⁸ The state district court denied counsel's motion to withdraw, finding that counsel could
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24 ⁴ ECF No. 26-3.

25 ⁵ ECF No. 26-27.

26 ⁶ ECF Nos. 26-25; 26-27.

27 ⁷ ECF Nos. 26-25 at 4; 26-27 at 3.

28 ⁸ ECF No. 26-7 at 3.

1 continue to represent Paez.⁹ The state district court imposed a “Chinese wall” so counsel was
 2 required to be screened or denied access to confidential or privileged information related to
 3 Adamson and his 2005 criminal matter.¹⁰

4 Following a jury trial, Paez was found guilty on all counts¹¹ and sentenced to 15 years to
 5 life in prison with the possibility of parole.¹² He appealed, and the Nevada Supreme Court
 6 affirmed the judgment of conviction.¹³ Paez then filed a state habeas petition.¹⁴ The state
 7 district court denied his state habeas petition and the Nevada Supreme Court affirmed that
 8 denial.¹⁵

9 After Paez filed his federal habeas corpus petition,¹⁶ the respondents moved to dismiss.¹⁷
 10 I granted that motion in part, finding, *inter alia*, that Grounds 4, 5, 7, in part, 8, 9, except as to
 11 9(d), 12, and 15 were unexhausted.¹⁸ I then ordered Paez to decide how to proceed, and he
 12 abandoned his unexhausted claims.¹⁹ The respondents answered the remaining claims in Paez’s
 13 petition,²⁰ and Paez replied.²¹

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 16 ⁹ ECF No. 26-29 at 23.

17 ¹⁰ *Id.* at 15, 23.

18 ¹¹ ECF No. 27-4.

19 ¹² ECF Nos. 27-8; 27-9.

20 ¹³ ECF No. 28-5.

21 ¹⁴ ECF No. 28-8.

22 ¹⁵ ECF Nos. 28-20; 28-4.

23 ¹⁶ ECF No. 10.

24 ¹⁷ ECF No. 25.

25 ¹⁸ ECF No. 43.

26 ¹⁹ ECF Nos. 43, 44, 46.

27 ²⁰ ECF No. 51.

28 ²¹ ECF No. 54.

1 In Paez's thirteen remaining grounds for relief, he alleges the following violations of his
2 federal constitutional rights:

- 3 1. Denial of effective assistance of counsel because the state district court assigned
4 trial counsel that had a conflict of interest.
- 5 2. Denial of effective assistance of counsel because the public defender's office
6 failed to perform a timely conflict check.
- 7 3. Denial of effective assistance of counsel because the state district court permitted
8 screened trial counsel to continue to represent Paez.
- 9 4. Denial of effective assistance of counsel because the district attorney's office
10 failed to timely disclose trial counsel's conflict of interest.
- 11 6. Denial of due process rights because the state district court excluded evidence that
12 Paez did not own a .22 caliber revolver.
- 13 7. Denial of due process rights because of the admission of in- and out-of-court
14 identification.
- 15 9D. Denial of effective assistance of appellate counsel because appellate counsel
16 failed to raise an issue on appeal.
- 17 10. Denial of due process because of the cumulative effect of ineffective-assistance.
- 18 11. Denial of effective assistance of appellate counsel because of cumulative errors.
- 19 12. Denial of effective assistance of counsel because of a conflict of interest.
- 20 13. Denial of effective assistance of counsel because trial counsel failed to object to
21 the photographic line-up.
- 22 14. Denial of effective assistance of counsel because of trial counsel failed to call a
23 witness.
- 24 15. Denial of effective assistance of counsel because trial counsel failed to obtain an
25 expert witness.

26 Discussion

27 A. Legal standards

28 1. *Antiterrorism and Effective Death Penalty Act (AEDPA)*

If a state court has adjudicated a habeas corpus claim on its merits, a federal district court
may only grant habeas relief with respect to that claim if the state court's adjudication "resulted
in a decision that was contrary to, or involved an unreasonable application of, clearly established

1 Federal law, as determined by the Supreme Court of the United States” or “resulted in a decision
 2 that was based on an unreasonable determination of the facts in light of the evidence presented in
 3 the State court proceeding.”²² A state court acts contrary to clearly established federal law if it
 4 applies a rule contradicting the relevant holdings or reaches a different conclusion on materially
 5 indistinguishable facts.²³ And a state court unreasonably applies clearly established federal law
 6 if it engages in an objectively unreasonable application of the correct governing legal rule to the
 7 facts at hand.²⁴ Section 2254 does not, however, “require state courts to *extend*” Supreme Court
 8 precedent “to a new context where it should apply” or “license federal courts to treat the failure
 9 to do so as error.”²⁵ The “objectively unreasonable” standard is difficult to satisfy,²⁶ “even
 10 ‘clear error’ will not suffice.”²⁷

11 Habeas relief may only be granted if “there is no possibility [that] fairminded jurists
 12 could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.”²⁸
 13 As “a condition for obtaining habeas relief,” a petitioner must show that the state-court decision
 14 “was so lacking in justification that there was an error well understood and comprehended in
 15 existing law beyond any possibility of fairminded disagreement.”²⁹ “[S]o long as ‘fairminded
 16 jurists could disagree’ on the correctness of the state court’s decision,” habeas relief under
 17 Section 2254(d) is precluded.³⁰ AEDPA “thus imposes a ‘highly deferential standard for

18 ²² 28 U.S.C. § 2254(d).

19 ²³ *Price v. Vincent*, 538 U.S. 634, 640 (2003).

20 ²⁴ *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014).

21 ²⁵ *White*, 134 S. Ct. 1705–06.

22 ²⁶ *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013).

23 ²⁷ *Wood v. McDonald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted); *see also*
 24 *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question . . . is not whether a federal court
 25 believes the state court’s determination was incorrect but whether that determination was
 unreasonable—a substantially higher threshold.”).

26 ²⁸ *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

27 ²⁹ *Id.* at 103.

28 ³⁰ *Id.* at 101.

1 evaluating state-court ruling,’ . . . and ‘demands that state-court decisions be given the benefit of
2 the doubt.’”³¹

3 If a federal district court finds that the state court committed an error under § 2254, the
4 district court must then review the claim de novo.³² The petitioner bears the burden of proving
5 by a preponderance of the evidence that he is entitled to habeas relief,³³ but state-court factual
6 findings are presumed correct unless rebutted by clear and convincing evidence.³⁴

7 **2. Standard for Federal Habeas Review of an Ineffective-Assistance Claim**

8 The right to counsel embodied in the Sixth Amendment includes “the right to the
9 effective assistance of counsel.”³⁵ Counsel can “deprive a defendant of the right to effective
10 assistance[] simply by failing to render ‘adequate legal assistance[.]’”³⁶ In the hallmark case of
11 *Strickland v. Washington*, the United States Supreme Court held that an ineffective-assistance
12 claim requires a petitioner to show that: (1) his counsel’s representation fell below an objective
13 standard of reasonableness under prevailing professional norms in light of all of the
14 circumstances of the particular case;³⁷ and (2) it is reasonably probable that, but for counsel’s
15 errors, the result of the proceeding would have been different.³⁸

16 A reasonable probability is “probability sufficient to undermine confidence in the
17 outcome.”³⁹ Any review of the attorney’s performance must be “highly deferential” and must

18 ³¹ *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

19 ³² *Frantz v. Haze*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (“[I]t is now clear both that we
20 may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error,
we must decide the habeas petition by considering de novo the constitutional issues raised.”).

21 ³³ *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

22 ³⁴ 28 U.S.C. § 2254(e)(1).

23 ³⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397
24 U.S. 759, 771 n.14 (1970)).

25 ³⁶ *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 335–36 (1980)).

26 ³⁷ *Strickland*, 466 U.S. at 690.

27 ³⁸ *Id.* at 694.

28 ³⁹ *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000).

1 adopt counsel's perspective at the time of the challenged conduct so as to avoid the distorting
 2 effects of hindsight.⁴⁰ "The question is whether an attorney's representation amounted to
 3 incompetence under prevailing professional norms, not whether it deviated from best practice or
 4 most common custom."⁴¹ The burden is on the petitioner to overcome the presumption that
 5 counsel made sound trial-strategy decisions.⁴²

6 The *Strickland* standard also applies to appellate counsel.⁴³ Appellate counsel does not
 7 have a constitutional obligation to raise every nonfrivolous issue requested by the appellee.⁴⁴
 8 "Experienced advocates since time beyond memory have emphasized the importance of
 9 winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at
 10 most on a few key issues."⁴⁵ A petitioner must show that counsel unreasonably failed to
 11 discover and argue nonfrivolous issues.⁴⁶ It is inappropriate to focus on what could have been
 12 done rather than focusing on the reasonableness of what counsel did.⁴⁷ The petitioner must
 13 prove that, but for counsel's errors, he would have prevailed on appeal.⁴⁸

14 The United States Supreme Court has described federal review of a state supreme court's
 15 decision on an ineffective-assistance claim as "doubly deferential."⁴⁹ So, the federal court must
 16 "take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of §
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18 ⁴⁰ *Strickland*, 466 U.S. at 689.

19 ⁴¹ *Harrington*, 562 U.S. at 104.

20 ⁴² *Id.*

21 ⁴³ *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted) (citing *Strickland*, 466 U.S. at
 22 687).

23 ⁴⁴ *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

24 ⁴⁵ *Id.* at 751–52.

25 ⁴⁶ *Delgado v. Lewis*, 223 F.3d 976, 980 (9th Cir. 2000) (citation omitted).

26 ⁴⁷ *Williams v. Woodford*, 384 F.3d 567, 616 (9th Cir. 2004) (citation omitted).

27 ⁴⁸ *Smith*, 528 U.S. at 285 (citation omitted).

28 ⁴⁹ *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

1 2254(d)'''⁵⁰ and consider only the record that was before the state court that adjudicated the
 2 claim on its merits.⁵¹

3 **B. Evaluating Paez's remaining grounds**

4 Paez alleges five claims related to the issue that his trial counsel was rendered ineffective
 5 because his counsel had a conflict of interest. He alleges two claims of ineffective-assistance
 6 related to his appellate counsel. Paez also asserts multiple claims that his trial counsel was
 7 ineffective for failing to file a motion to suppress and for failing to call a lay witness as well as
 8 an expert witness. Finally, Paez alleges that he was denied his constitutional rights as a result of
 9 the state district court's rulings on the introduction of evidence.

10
 11 ***1. Grounds 1 through 4—ineffective assistance re: trial counsel's conflict of Interest***

12 In Grounds 1 through 4, Paez asserts claims related to the allegation that he was denied
 13 effective assistance of counsel because his trial counsel had a conflict of interest. In Ground 1,
 14 Paez alleges that he was denied effective assistance of counsel when the state court assigned a
 15 deputy public defender to represent him though the public defender's office had previously
 16 represented Adamson, the victim-witness in Paez's case.⁵² In Ground 2, Paez alleges that his
 17 counsel was rendered ineffective because the public defender's office failed to perform a timely
 18 "conflict check."⁵³ In Ground 3, Paez asserts that the state district court erroneously permitted
 19 counsel to continue to represent him by imposing a "Chinese wall" or screening Paez's counsel
 20 from confidential or privileged information.⁵⁴ In Ground 4, Paez asserts that the district
 21 attorney's office's failure to timely disclose the conflict of interest violated his right to effective-
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 24 ⁵⁰ *Id.*

25 ⁵¹ *Id.* at 181–84.

26 ⁵² ECF No. 10 at 3.

27 ⁵³ *Id.* at 8.

28 ⁵⁴ *Id.* at 11–12.

1 assistance-of-counsel.⁵⁵ On direct appeal, the Nevada Supreme Court found these claims
2 meritless:

3 Paez contends that he was deprived of conflict-free counsel in
4 violation of the federal and state constitutions and the Nevada
5 Rules of Professional Conduct. He specifically claims that the
6 justice court should have conducted a conflicts check, the public
7 defender's office should have conducted a conflicts check, the
8 district court should have urged the public defender's office to seek
9 written waivers instead of erecting a "Chinese wall," and the
10 district attorney's office should have disclosed the conflict sooner.
11 ...

12 The record reveals that the public defender's office represented
13 Paez's victim in an unrelated matter four years before the instant
14 offense. Paez and the victim were not represented by the same
15 public defenders. The potential conflict was discovered shortly
16 before trial. And the district court heard argument on the conflict,
17 established a "Chinese wall" to protect the victim's privileged
18 information, and denied the deputy public defender's motion to
19 withdraw. Given this record, we conclude that Paez has not
20 demonstrated the existence of an actual conflict, the potential
21 conflict could not be imputed to Paez's deputy public defender, the
22 district court's decision to screen the deputy public defender was a
23 prudent measure, and the late discovery and notice of the potential
24 conflict was of no consequence. [FN2]

25 [FN2] The prosecutor's special responsibilities under RPC 3.8(d)
26 are not implicated here because the existence of a potential conflict
27 is not exculpatory evidence or information.⁵⁶

28 I find that the Nevada Supreme Court's rejection of Paez's claims was neither contrary to
nor an unreasonable application of clearly established laws as determined by the United States
Supreme Court. An error by counsel, even if professionally unreasonable, does not warrant
setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.⁵⁷
An exception to the usual *Strickland* prejudice requirement exists, however, if "counsel [was]
burdened by an actual conflict of interest."⁵⁸ "[P]rejudice will be presumed only if the conflict
has significantly affected counsel's performance—thereby rendering the [outcome] unreliable,

⁵⁵ *Id.* at 14.

⁵⁶ ECF No. 28-5 at 2, 4.

⁵⁷ *Strickland*, 466 U.S. at 691.

⁵⁸ *Id.* at 692. *See also United States v. Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017).

1 even though the *Strickland* prejudice cannot be shown.”⁵⁹ To show “an actual conflict of
2 interest,” a petitioner must demonstrate an “adverse effect” on counsel’s performance.⁶⁰ “[A]n
3 actual conflict of interest means precisely a conflict that affected counsel’s performance — as
4 opposed to a mere theoretical division of loyalties.”⁶¹

5 The Nevada Supreme Court reasonably rejected Paez’s claims asserted in Grounds 1
6 through 4, concluding that Paez had not demonstrated an actual conflict, the potential conflict
7 could not be imputed to the deputy public defender who represented Paez at trial, and “the late
8 discovery and notice of the potential conflict was of no consequence.”⁶² Although the public
9 defender’s office also represented the victim-witness in an unrelated matter, Paez and the victim-
10 witness were not represented by the same deputy public defenders. Counsel was screened from
11 any confidential or privileged information and did not access such information.⁶³ Paez failed to
12 demonstrate a basis on which it could be concluded that the public defender’s office’s prior
13 representation of the victim-witness had any adverse effect on counsel’s representation of Paez.
14 The record shows that counsel’s cross-examination of the victim-witness was vigorous and
15 thorough.⁶⁴ Counsel cross-examined the victim-witness on, *inter alia*, his drug use and gross
16 misdemeanor conviction.⁶⁵ And on April 22, 2010, the state prosecuting attorney contacted
17 counsel to inform him that the public defender’s office represented the victim-witness in 2003
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20 ⁵⁹ *Mickens v. Taylor*, 535 U.S. 162, 173 (2002).

21 ⁶⁰ *Mickens*, 535 U.S. at 172 n.5; *see also Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir.
22 2006)(noting that the petitioner must demonstrate “that some plausible alternative defense
23 strategy or tactic might have been pursued but was not and that the alternative defense was
inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests”).

24 ⁶¹ *Mickens*, 535 U.S. at 171.

25 ⁶² ECF No. 28-5 at 4.

26 ⁶³ ECF No. 26-29 at 5–6.

27 ⁶⁴ ECF No. 27-1 at 92–119.

28 ⁶⁵ *Id.* at 97–99.

1 for a gross misdemeanor offense.⁶⁶ Paez has not demonstrated nor does the record show that the
 2 State was aware of a potential conflict prior to the date of the State's disclosure. Because Paez
 3 has not demonstrated that his counsel had an actual conflict of interest that adversely affected his
 4 representation, the Nevada Supreme Court reasonably concluded that Paez was not deprived of
 5 his right to effective assistance of counsel as alleged in Grounds 1 through 4.

6 I would reach the same result on Ground 1 on *de novo* review. In *Holloway v.*
 7 *Arkansas*,⁶⁷ a single public defender represented three defendants at the same trial. The United
 8 States Supreme Court held that state trial courts are required to investigate timely objections to
 9 the multiple representation of co-defendants.⁶⁸ The Sixth Amendment, however, does not
 10 require state trial courts to initiate inquiries into whether a potential conflict exists unless the trial
 11 court knows or reasonably should know that a particular conflict exists.⁶⁹ Accordingly, under
 12 *Holloway*, the state court's alleged failure to conduct a conflict check at the time that counsel
 13 was assigned did not result in a violation of Paez's right to counsel.

14 Moreover, the Nevada Supreme Court's conclusion that the potential conflict was not
 15 imputed to counsel and that the state trial court's "decision to screen [counsel] was a prudent
 16 measure"⁷⁰ was not contrary to nor an unreasonable application of clearly established law as
 17 determined by the United States Supreme Court. When counsel requested permission to
 18 withdraw shortly before trial was set to begin, the trial court heard argument on the conflict.⁷¹
 19 As the Nevada Supreme noted, the victim-witness was a former client of the public defender's
 20 office in an unrelated matter that occurred approximately four years prior. The record did not
 21 indicate that there was a substantial relationship between the two cases or similar factual contexts

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 23 ⁶⁶ ECF No. 26-28 at 3–4.

24 ⁶⁷ *Holloway v. Arkansas*, 435 U.S. 475, 481–82 (1978).

25 ⁶⁸ *Id.* at 483–487.

26 ⁶⁹ *Cuyler*, 446 U.S. at 346–47.

27 ⁷⁰ ECF No. 28-5 at 4.

28 ⁷¹ *See Holloway*, 435 U.S. at 475.

1 of the two representations. Therefore, the Nevada Supreme Court’s rejection of Paez’s claim as
 2 asserted in Ground 3 was not contrary to nor an unreasonable application of clearly established
 3 federal law.

4 **2. Ground 12 — *ineffective assistance re: trial counsel’s conflict of interest***

5 In Ground 12, Paez asserts that trial counsel was unable to effectively represent him
 6 because of the client conflict.⁷² He argues that because trial counsel could not use confidential
 7 information, he was not capable of “putting on the best defense possible for Paez.”⁷³ He further
 8 provides that that his appellate counsel was a deputy public defender and the Nevada Supreme
 9 Court granted his appellate counsel’s motion to withdraw.⁷⁴ Respondents reiterate that Paez
 10 failed to identify any actual conflict that applied to his trial attorney.⁷⁵ In Paez’s state habeas
 11 appeal, the Nevada Supreme Court noted that it “rejected Paez’s Sixth Amendment claim on
 12 appeal, determining that Paez had not demonstrated an actual conflict and the potential conflict
 13 could not be imputed to the deputy public defender who represented Paez at trial.”⁷⁶

14 I find that the Nevada Supreme Court’s rejection of Paez’s claim was neither contrary to
 15 nor an unreasonable application of clearly established laws as determined by the United States
 16 Supreme Court. For the reasons discussed in the preceding section, the Nevada Supreme Court
 17 reasonably concluded that Paez failed to demonstrate an actual conflict resulting in an adverse
 18 effect on trial counsel’s representation of Paez. Further, the Nevada Supreme Court granted
 19 appellate counsel’s motion to withdraw “based on the specific representations in the motion
 20 related to [appellate counsel]”⁷⁷ who was not the same deputy public defender that represented
 21 Paez at trial. Accordingly, Paez is denied habeas relief on Ground 12.

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 23 ⁷² ECF No. 10 at 68–72.

24 ⁷³ *Id.* at 69–70.

25 ⁷⁴ *Id.*

26 ⁷⁵ ECF No. 51 at 8–9.

27 ⁷⁶ ECF No. 28-41 at 3, n.1.

28 ⁷⁷ ECF No. 27-28 at 2, n.1.

3. ***Ground 6 — denial of due process re: exclusion of evidence.***

In Ground 6, Paez alleges that he was denied his constitutional rights because the state district court did not permit him to introduce “evidence that [Paez] did not own a .22 caliber firearm or revolver.”⁷⁸ The state district court sustained the State’s objection to Paez introducing evidence that he had registered two firearms prior to an unrelated 2002 felony conviction for the purpose of showing that Paez did not own a .22 caliber revolver, the type of firearm used in the shooting.⁷⁹ On direct appeal, the Nevada Supreme Court found no error in this ruling:

Paez contends that he was deprived of his constitutional rights when he was not allowed to introduce evidence that he did not own a .22 caliber firearm. “We review a district court’s decision to admit or exclude evidence for abuse of discretion.” *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). During cross-examination, defense counsel asked a police detective whether Paez legally owned two handguns, the State objected, and the district court sustained the objection after a bench conference. The district court made a record of the bench conference stating that Paez had registered the handguns before he was convicted of a felony and any questions as to why he would not register newly acquired handguns would open the door to evidence of the felony conviction. We conclude from this record that the district court did not abuse its discretion by excluding evidence that Paez had legally owned firearms in the past. *See* NRS 48.035(1).⁸⁰

I find that the Nevada Supreme Court’s rejection of Paez’s claim was neither contrary to nor an unreasonable application of clearly established laws as determined by the United States Supreme Court. The federal courts “are not a state supreme court of errors; we do not review questions of state evidence law.”⁸¹ “[F]ederal habeas review of [state] trial error is limited to whether the error ‘so infected the trial with unfairness as to make the resulting conviction a

⁷⁸ ECF No. 10 at 19–20.

⁷⁹ ECF No. 27-2 at 97–98.

⁸⁰ ECF No. 28-5 at 5.

⁸¹ *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

1 denial of due process.”⁸² Whether the admission of evidence violated state law “is no part of a
2 federal court’s habeas review of a state conviction.”⁸³

3 The Nevada Supreme Court reasonably denied Paez’s claim because the state district
4 court’s decision to sustain the State’s objection to introducing evidence of Paez’s firearm
5 registration prior to his 2002 conviction did not infect the trial with unfairness or result in a
6 denial of due process. The state district court reasoned that Paez “could legally own guns prior
7 to his conviction,” but “he’s not going to go in and register a gun when he’s a convicted
8 person.”⁸⁴ As the Nevada Supreme Court noted, a line of questioning regarding why Paez would
9 not register newly acquired firearms would open the door to the introduction of evidence
10 regarding his felony conviction.⁸⁵ The Nevada Supreme Court’s determination that the state
11 district court did not abuse its discretion in its decision to exclude evidence where its probative
12 value is outweighed by the danger of prejudice was not contrary to clearly established law as
13 determined by the United States Supreme Court. Accordingly, Ground 6 provides no basis for
14 habeas relief.

15 **4. Ground 13—ineffective assistance re: photographic line-up**

16 In Ground 13, Paez alleges that trial counsel was rendered ineffective for failing to move
17 to suppress the victim’s identification of Paez by a “tainted” photographic line-up.⁸⁶ Paez argues
18 that the photographic line-up was unnecessarily suggestive because his nickname “Bounce” was
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22 ⁸² *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637,
643 (1974)).

23 ⁸³ *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

24 ⁸⁴ ECF No. 27-2 at 99.

25 ⁸⁵ *See Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (due process rights are not offended by
26 exclusion of relevant evidence where its probative value is outweighed by danger of prejudice or
27 confusion).

28 ⁸⁶ ECF No. 10 at 74.

1 printed above his photo.⁸⁷ In Paez's state habeas appeal, the Nevada Supreme Court found no
 2 error:

3 Paez argues that trial counsel failed to move to suppress the
 4 photographic-lineup identification on the ground that it was
 5 impermissibly suggestive because the alleged shooter's nickname
 6 was printed next to his photograph. The lineup was not
 7 impermissibly suggestive because the men pictured in the lineup
 8 matched the victim's description of the perpetrator and the victim
 9 had previously met Paez socially, gave a description of the shooter
 10 that matched Paez, and was certain about his identification, both
 11 initially and at trial. *See Thompson v. State*, 125 Nev. 807, 813–
 12 14, 221 P.3d 708, 713 (2009) (“A photographic identification must
 be set aside only if the photographic identification procedure was
 so impermissibly suggestive as to give rise to a very substantial
 likelihood of irreparable misidentification.” (internal brackets and
 quotation marks omitted)). Contrary to Paez's assertion, the
 shooter's nickname was used as the lineup name and was not
 associated with any individual photograph included in the array.
 Paez did not show deficient performance or prejudice.
 Accordingly, the district court did not err in denying this claim
 without an evidentiary hearing.⁸⁸

13 I find that the Nevada Supreme Court's rejection of Paez's claim was neither contrary to
 14 nor an unreasonable application of *Strickland*. Counsel's decision not to file a motion to
 15 suppress regarding the victim's identification of Paez by photographic line-up did not amount to
 16 “incompetence under prevailing professional norms.”⁸⁹ The victim-witness testified that he had
 17 met Paez on two separate occasions prior to the day of the shooting and had also identified the
 18 apartment building where he had met Paez.⁹⁰ The victim-witness provided a physical description
 19 that matched Paez as well as the nickname “Bounce.”⁹¹ And as the Nevada Supreme Court
 20 noted, it was the photographic line-up that was titled “Bounce,” not any of the specific photos in
 21 the array.

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 24 ⁸⁷ *Id.*

25 ⁸⁸ ECF No. 28-41 at 3–4.

26 ⁸⁹ *Harrington*, 562 U.S. at 104.

27 ⁹⁰ ECF No. 27-1 at 54; ECF No. 27-2 at 43, 84.

28 ⁹¹ ECF No. 27-2 at 40.

Accordingly, Paez did not demonstrate that there was a basis for objectively reasonable counsel to successfully move to suppress the identification of Paez by photographic line-up. Counsel's decision not to file a motion to suppress does not fall "outside the wide range of professionally competent assistance."⁹² In order to prevail on an ineffective assistance of counsel claim, Paez must show that his counsel acted deficiently and "a reasonable probability that, but for counsel's [deficiencies], the result of the proceeding would have been different."⁹³ However, I need not "address both components of the inquiry" if there is "an insufficient showing on one."⁹⁴ Paez has not sufficiently demonstrated here his counsel's "representation fell below an objective standard of reasonableness."⁹⁵ Therefore, the *Strickland* inquiry can stop here, and Paez is denied federal habeas relief on Ground 13.

5. Ground 7—denial of due process re: in- and out-of-court identification

In Ground 7, Paez alleges that the state district court erred in admitting the victim's in and out-of-court identifications of Paez because such identifications were "tainted by use of a blatantly suggestive photographic line-up that displayed [Paez's] alleged nickname over the top of [his] picture."⁹⁶ On direct appeal, the Nevada Supreme Court found this unpreserved objection not to be plain error:

Paez contends that he was deprived of his constitutional rights when the district court admitted identification evidence because the victim's in-court and out-of-court identifications were based on an unnecessarily suggestive photographic line-up, which was also admitted into evidence. However, Paez did not object to the admission of this evidence and the error is not plain from our review of the record. *See Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009) ("A photographic lineup is suggestive if, given the totality of the circumstances, the procedure was so unduly prejudicial as fatally to taint the defendant's conviction." (internal quotation marks and brackets omitted)); *Valdez*, 124 Nev.

⁹² *Strickland*, 466 U.S. at 690.

⁹³ *Id.* at 694.

⁹⁴ *Id.* at 697.

⁹⁵ *Id.*

⁹⁶ ECF No. 10 at 22.

at 1190, 196 P.3d at 577 (reviewing unpreserved claims for plain error).⁹⁷

I find that the Nevada Supreme Court’s conclusion was neither contrary to nor an unreasonable application of clearly established federal laws. The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process.⁹⁸ Further, “[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas relief if not forbidden by ‘clearly established Federal law,’ as laid out by the Supreme Court.”⁹⁹ The United States Supreme Court “has not yet made a ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.”¹⁰⁰ Moreover, under clearly established United States Supreme Court authority, even a suggestive identification procedure does not violate the Constitution unless it renders the identification unreliable under the totality of the circumstances.¹⁰¹

Upon review of the record, the Nevada Supreme Court reasonably found no error with the victim-witness’s identification of Paez based on the photographic line-up. In Paez’s state habeas appeal and for the reasons stated above, the Nevada Supreme Court found that the photographic line-up was not impermissibly suggestive.¹⁰² Further, under the totality of the circumstances, the victim’s identification of Paez was not rendered unreliable. Because the admission of the in-court and out-of-court identifications did not infect the trial with unfairness

⁹⁷ ECF No. 28-5 at 5–6.

⁹⁸ *Estelle*, 502 U.S. at 67–68. *See also Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995).

⁹⁹ *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (citing 28 U.S.C. § 2254(d)); *see also Dowling v. United States*, 493 U.S. 342, 352 (1990) (explaining that the United States Supreme Court has “defined the category of infractions that violate ‘fundamental unfairness’ very narrowly”).

¹⁰⁰ *Yarborough*, 568 F.3d at 1101.

¹⁰¹ *See Manson v. Brathwaite*, 432 U.S. 98, 113 (1977); *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *see also Perry v. New Hampshire*, 565 U.S. 228, 245 (2012).

¹⁰² ECF No. 28-41 at 3–4.

as to make Paez's conviction a denial of due process, habeas relief is not warranted on Ground 7.

6. Grounds 9D and 11 — ineffective assistance re: appellate counsel

In Ground 9(D), Paez alleges that appellate counsel failed to properly raise the issue that Paez was denied his Sixth Amendment right to conflict-free counsel because the public defender's office did not perform a conflict check.¹⁰³ In Ground 11, Paez asserts that he was denied effective assistance of appellate counsel due to the cumulative effect of the errors of appellate counsel.¹⁰⁴ But Paez did not assert any cumulative-error claims in state court, and I permitted Ground 11 to proceed to the extent any ineffective-assistance-of-appellate-counsel claims were procedurally viable.¹⁰⁵ As Ground 9(D) remains as the only procedurally viable claim of ineffective assistance of counsel, I review Grounds 9(D) and dismiss Ground 11.

In Paez's state habeas appeal, the Nevada Supreme Court found no error:

Paez first argues that trial counsel had a conflict of interest but failed to move to withdraw and that appellate counsel failed to assert a Sixth Amendment challenge based on the purported conflict. Both claims are belied by the record as trial counsel attempted to withdraw multiple times and appellate counsel raised the issue on appeal. The district court therefore did not err in denying the claim without an evidentiary hearing.¹⁰⁶

I find that the Nevada Supreme Court reasonably rejected Paez's claim because the record belied his contention that appellate counsel failed to raise on appeal the issue that Paez was denied conflict-free counsel. On direct appeal, appellate counsel alleged, *inter alia*, that the public defender's office's "failure to conduct a complete check in a timely manner, regardless of the reason for the failure, denied [Paez] of his constitutional right to effective assistance of independent counsel."¹⁰⁷ That claim sufficiently set forth the claim that Paez was denied conflict-free counsel in violation of his Sixth Amendment rights. The record belies Paez's claim,

¹⁰³ ECF No. 10 at 59.

¹⁰⁴ *Id.* at 66.

¹⁰⁵ ECF No. 43 at 8–9.

¹⁰⁶ ECF No. 28-41 at 3.

¹⁰⁷ ECF No. 27-39 at 24.

1 which is factually inaccurate; the Nevada Supreme Court reasonably concluded that he failed to
 2 show ineffective assistance of appellate counsel. Paez is, therefore, denied habeas relief on
 3 Grounds 9(D) and 11.

4 **7. Ground 14—ineffective assistance re: failure to call witness**

5 In Ground 14, Paez alleges that he was denied effective assistance of counsel because his
 6 trial counsel failed to investigate and call Sanford as a witness.¹⁰⁸ Paez asserts that Sanford
 7 would have testified that Paez did not shoot the victim.¹⁰⁹ In Paez’s state habeas appeal, the
 8 Nevada Supreme Court found no merit to this argument:

9 Paez argues that trial counsel failed to investigate and call G.S. to
 10 testify. Paez has merely speculated that G.S.’s testimony would be
 11 favorable without alleging specific facts to which she would
 12 testify. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538
 13 (2004) (Petitioner claiming counsel did not conduct adequate
 14 investigation must specify what a more thorough investigation
 15 would have uncovered). Further, the record shows that had
 16 counsel called G.S. to testify, the State could discredit her
 17 testimony as biased toward Paez based on her tattoo of his initials
 18 and jail calls discussing changing her story to exculpate Paez and
 19 showing her close relationship with Paez. *See Doleman v. State*,
 20 112 Nev. 843, 848, 921 P.2d 278, 280–81 (1996) (“A strategy
 21 decision, such as who should be called as a witness, is a tactical
 22 decision that is virtually unchallengeable absent extraordinary
 23 circumstances.” (internal quotation marks omitted)). Accordingly,
 24 Paez failed to alleged [sic] sufficient facts that, if true, would
 25 demonstrate deficient performance and prejudice. The district
 26 court therefore did not err in denying this claim without an
 27 evidentiary hearing.¹¹⁰

28 I find that the Nevada Supreme Court’s rejection of Paez’s claim was neither contrary to
 nor an unreasonable application of *Strickland*. In assessing counsel’s investigation, I must
 conduct an objective review of counsel’s performance, measured for “reasonableness under
 prevailing professional norms.”¹¹¹ This includes a context-dependent consideration of the

¹⁰⁸ ECF No. 10 at 77.

¹⁰⁹ *Id.* at 79–80.

¹¹⁰ ECF No. 28-41 at 3–4.

¹¹¹ *Strickland*, 466 U.S. at 688.

1 challenged conduct as seen “from counsel’s perspective at the time.”¹¹² Further, “strategic
2 choices made after thorough investigation of law and facts relevant to plausible options are
3 virtually unchallengeable.”¹¹³

4 The Nevada Supreme Court reasonably determined that Paez failed to demonstrate his
5 trial counsel’s investigative decisions and failure to call Sanford as a witness in support of Paez’s
6 defense were objectively unreasonable. As noted by the Nevada Supreme Court, if Sanford had
7 been called as a witness, the State could have discredited her as biased towards Paez. Recorded
8 telephone calls between Paez and Sanford show that Paez and Sanford had a romantic
9 relationship.¹¹⁴ Sanford had a tattoo of Paez’s initials and Paez spoke to her about covering the
10 tattoo.¹¹⁵ In addition, Sanford had admitted to a detective that she was in a car with Paez and the
11 victim on the day of the shooting, which corroborated the victim’s testimony.¹¹⁶ For all these
12 reasons, it was reasonable to find Paez had not shown his counsel was deficient. Therefore, the
13 Nevada Supreme Court reasonably determined Paez did not demonstrate his counsel fell below
14 an objective standard of reasonableness in accordance with the first prong of *Strickland*.

15 **8. Ground 15—ineffective assistance re: failure to obtain expert witness**

16 In Ground 15, Paez alleges that his trial counsel rendered ineffective assistance because
17 counsel failed to obtain an expert regarding the victim-witness’s methamphetamine use for the
18 purpose of impeaching the victim-witness’s credibility.¹¹⁷ In Paez’s state habeas appeal, the
19 Nevada Supreme Court rejected this claim:

20 Paez argues that trial counsel failed to call an expert to testify
21 about the effect of regular methamphetamine usage on the victim’s
22 ability to perceive and remember the shooting Paez failed to show
prejudice where trial counsel cross-examined the victim on the use

23 ¹¹² *Id.* at 689. See *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

24 ¹¹³ *Strickland*, 466 U.S. at 690.

25 ¹¹⁴ ECF No. 27-2 at 62–66.

26 ¹¹⁵ *Id.*

27 ¹¹⁶ *Id.* at 18.

28 ¹¹⁷ ECF No. 10 at 82.

1 of methamphetamine and the paramedic and detective who spoke
2 with the victim shortly after the shooting each testified that the
3 victim was coherent, able to communicate, and not intoxicated.
Accordingly, the district court did not err in denying this claim
without an evidentiary hearing.¹¹⁸

4 The Nevada Supreme Court's determination that Paez failed to demonstrate prejudice
5 was not an unreasonable application of *Strickland*. Paez failed to demonstrate a reasonable
6 probability that, but for counsel's failure to call an expert to testify about the effect of regular
7 methamphetamine usage on the victim's ability to perceive and remember the shooting, the
8 outcome of the trial would have been different. Counsel cross-examined the victim on his
9 methamphetamine use.¹¹⁹ Counsel elicited testimony that the victim had a glass pipe and
10 lighters in his possession on the night of the shooting.¹²⁰ The victim-witness, however, testified
11 that he did not use any drugs on the night of the shooting.¹²¹ Further, the paramedic that
12 assessed the victim's injuries shortly after the shooting testified that the victim was oriented and
13 appropriately answering questions.¹²² The detective that interviewed the victim at the hospital
14 shortly after the shooting testified that the victim communicated clearly and did not appear to be
15 under the influence of a controlled substance.¹²³ Therefore, the Nevada Supreme Court
16 reasonably determined that Paez failed to demonstrate that he was prejudiced by counsel's
17 failure to call an expert witness. Paez is denied habeas relief on Ground 15.

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23 ¹¹⁸ ECF No. 28-41 at 4–5.

24 ¹¹⁹ ECF No. 27-1 at 96–98.

25 ¹²⁰ *Id.* at 113–14.

26 ¹²¹ *Id.* at 114.

27 ¹²² *Id.* at 139–40.

28 ¹²³ ECF No. 27-2 at 14.

1 **9. Ground 10**

2 In Ground 10, Paez alleges constitutional violations based on the cumulative effect of
 3 trial counsel’s ineffective assistance.¹²⁴ Although he did not assert any cumulative-error claims
 4 in state court, I ruled that Ground 10 could proceed to the extent of any procedurally viable
 5 ineffective-assistance-of-trial-counsel claims asserted in this action.¹²⁵ The cumulative effect of
 6 multiple errors can violate due process and warrant habeas relief where the errors have “so
 7 infected the trial with unfairness as to make the resulting conviction a denial of due
 8 process.”¹²⁶ However, as I have determined that Paez has not shown trial counsel rendered
 9 ineffective assistance, there are no errors to consider cumulatively. Accordingly, the claim in
 10 Ground 10 fails and Paez is denied habeas relief on Ground 10.

11 **C. Certificate of Appealability**

12 The right to appeal from the district court’s denial of a federal habeas petition requires a
 13 certificate of appealability. To obtain that certificate, the petitioner must make a “substantial
 14 showing of the denial of a constitutional right.”¹²⁷ “Where a district court has rejected the
 15 constitutional claims on the[ir] merits,” that showing “is straightforward: The petitioner must
 16 demonstrate that reasonable jurists would find the district court’s assessment of the constitutional
 17 claims debatable or wrong.”¹²⁸ Because I have rejected petitioner’s constitutional claims on their
 18 merits, and he has not shown that this assessment of his claims is debatable or wrong, I find that
 19 a certificate of appealability is unwarranted in this case.

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23 ¹²⁴ ECF No. 10 at 64.

24 ¹²⁵ ECF No. 43 at 8.

25 ¹²⁶ *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Parle v. Runnels*, 505 F.3d 922, 927
 26 (9th Cir. 2007).

27 ¹²⁷ 28 U.S.C. § 2253(c).

28 ¹²⁸ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077–
 79 (9th Cir. 2000).


Conclusion

IT IS THEREFORE ORDERED that the petition [ECF No. 10] is **DENIED**.

And because reasonable jurists would not find my decision to deny this petition to be debatable or wrong, a **certificate of appealability is DENIED**.

The Clerk of Court is directed to ENTER JUDGMENT accordingly and CLOSE THIS CASE.

Dated: March 3, 2021



U.S. District Judge Jennifer A. Dorsey